IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1009 of 2005

WITH

CIVIL APPLICATION NO. 1195 of 2005

WITH

CIVIL APPLICATION NO. 153 of 2007

M/s Varun Enterprises ... Appellants

V/s

1. Mr.Mohamed Shafi Miya Patel
2. Mrs. Khatoon Bi Miya Patel
3. CIDCO Ltd. .. Respondents

Shri S.U.Kamdar for the appellants

Shri V.B.Naik for the Respondents

CORAM:S.R.SATHE,J.

DATED;24th Oct. 2007

ORAL ORDER :-

1. Heard both the learned Advocates at length.

2. The appeal is heard finally at admission stage.

3. The appellants original plaintiffs have preferred this appeal against the order passed below Exh.5 in Special Civil Suit No.14 of 2005 whereby the Civil Judge, S.D., Alibag-Raigad rejected the plaintiffs' application for temporary injunction restraining defendant nos.1 and 2 from creating any third party interest in the suit property.

4. For the sake of convenience hereafter parties shall be referred to as the plaintiffs and defendants.

5. The brief facts giving rise to this appeal are as under :-

. The land bearing Survey No.6H No.D+100/2+6+7+8/2 admeasuring 35 gunthas of village Owe, Taluka Kharghar, Navi Mumbai was owned by defendant nos. 1 and 2. In the year 1994 or thereabout the State Government acquired lands in and around Navi Mumbai for the purpose of development of New Town of Navi Mumbai. As there were agitation against the said acquisition and the amount of compensation to be paid, the Government of Maharashtra promulgated a scheme known as "12.5% scheme" under which every project affected person was entitled to get allotment of 12.5% land at nominal rate of the total land

acquired from the said project affected persons.

6. In the month of September 1994 the defendant nos.1 and 2 approached the plaintiffs-builders and developers and represented to them that they are entitled to receive land approximately 300 sq.mtrs under 12.5% scheme and that the plaintiffs should acquire the assignment cum development rights of the said land that will be allotted to the defendant nos.1 and 2. Accordingly, an agreement was executed by defendant nos.1 and 2 in favour of the plaintiffs whereby the defendant nos.1 and 2 agreed to accept amount of Rs.5,10,000/- at the rate of Rs.1700/- per sq.mtr for 300 sq.mtrs and to give the said land to the plaintiffs. The defendant nos. 1 and 2 accepted amount of Rs.1,27,500/- i.e. 25% of the total consideration from the plaintiffs. 50% amount was to be paid by the plaintiffs to the defendants after defendant nos 1 and 2 obtaining letter of allotment from the defendant no.3. The defendant nos.1 and 2 also agreed to give necessary co-operation to the plaintiffs for the effective transfer of the said land or plot in favour of the plaintiffs and to complete all the formalities of assignment/transfer in favour of the plaintiffs. Defendants also agreed that as soon as the defendants 1 and 2 received letter of allotment from the defendant no.3 they would hand over the same to the plaintiffs.

7. In the last week of December 2004 the plaintiffs came to know that the defendant no.3 has allotted plot no.28 Sector 34B Owe village Kharghar to defendant nos.1 and 2. Naturally, the plaintiffs asked the defendant nos.1 and 2 to comply with the agreement dated 21-9-1994. However, the defendants failed to comply with the agreement dated 21-9-1994. The defendants even refused to speak, hence plaintiffs issued notice to the defendant nos.1 and 2 and called upon them to comply the terms and conditions of the agreement. The defendants gave reply and contended that no such agreement has been executed by them and that their signatures have been obtained by the plaintiffs when defendants approached them and took amount of Rs.1,27,500/- by way of loan. Considering the attitude of the defendants and their denial to the fact of execution of the agreement, the plaintiffs filed suit for specific performance of the agreement in the Court of the Civil Judge,S.D., Raigad-Alibag and prayed for declaration that the agreement dated 21-9-1994 is valid and subsisting and prayed for direction to the defendants to complete the terms and conditions of the agreement.

8. The plaintiffs also prayed for temporary injunction restraining defendants from creating any third party interest in the plot no.28 Sector

34B,village Owe, Kharghar and for that filed application Exh.5.

9. The defendant nos.1 and 2 filed their joint written statement and opposed the application on several grounds. They contended that suit filed by the plaintiffs is not in time, the same is also barred by principle of estoppel. They further contended that there are other sharers in the land bearing Survey No.6 H.No.1B 1D/2 +6+7 and they are necessary parties. The defendants further contended that in the month of September 1994 they approached the plaintiffs as they were known to them and asked them to provide loan and accordingly plaintiffs advanced Rs.1,27,000/- by way of loan without interest and obtained their signatures on some stamp paper which was written in English. When defendants made query as to why their signatures are being obtained, the plaintiffs told them that the same are obtained by way of security. It is the contention of the defendants that after 1994 till the time the plaintiffs issued notice, defendants did nothing. They even did not ask the defendants to repay the amount. The defendants further contended that they had never agreed that the plot which will be allotted to them will be given to the plaintiffs. The defendants therefore contended that the plaintiffs' suit is false and on the day when the alleged

agreement was executed no land was in fact allotted to the defendants and as such there was no question of executing any agreement in respect of the land which was not with the defendants nos 1 and 2. The defendants, therefore contended that the agreement in question is not legal and valid. Hence on all these grounds the defendant nos.1 and 2 prayed for dismissal of the application.

10. The Respondent no.3 CIDCO also filed say and opposed the application. They contended that the suit is bad for want of statutory notice under MRTP Act. They also contended that land bearing Survey No.6/6-7-8 and Survey No.6/1B-1D/2-6-7-8/2 situated at Owe was owned by the defendants nos. 1 and others and they were entitled to receive land of 300 sq.mtrs under 12.5% scheme. They however contended that no allotment letter has been issued to the defendants till the filing of the say. The defendant no.3 further contended that in respect of the land bearing Survey No.298/3 plot of 100 sq.mtr bearing NO.161 situated in Sector 30 is allotted to defendant. A plot of 400 sq.mtrs bearing No.28 Sector 34 B Owe is allotted to defendant no.1 and plot of 250 sq.mtrs bearing no.115 situated in Sector no.30 was allotted to defendants and others. The defendants contended that the plaintiffs are not entitled for relief of temporary injunction as prayed and balance of

convenience is not in their favour.

11. After hearing the arguments of the learned Advocates on both sides and considering the documents produced on record, the learned trial Judge came to the conclusion that the question as to whether defendants were deceived and their signatures were obtained on the alleged agreement has to be decided after full fledged trial. However, according to him on the date of execution of the agreement to sale or assignment of the property, the property was not actually in existence and so the agreement in question dated 21-9-1994 is void. He, therefore, observed that the plaintiffs have failed to make out any prima facie case and the balance of convenience is not in favour of the plaintiffs. He, therefore, rejected the plaintiffs application and directed the defendant nos.1 and 2 to deposit amount of Rs.1,27,000/- which they had received from the plaintiffs in the court within 15 days from the date of the order.

12. Being aggrieved by the said order the plaintiffs have filed the present appeal. In this appeal before me, Shri S.U.Kamdar, learned Advocate for the plaintiffs has urged only 3 points. Firstly, he submitted that the finding recorded by the learned trial Judge that the agreement in question is void

because the property was not in existence on the day when the agreement was executed is erroneous. Secondly, he canvassed before me that the learned trial Judge ought to have considered the fact that the defendants had admitted that the document in question dated 21-9-1994 is signed by them. He, therefore, submitted that the learned trial Judge ought to have held that the plaintiffs have made out a prima facie case having regard to the fact that the plaintiffs had already parted with amount of Rs.1,27,000/- long back and the same had remained with defendant nos 1 and 2, it was not proper on the part of the learned trial Judge to observe that balance of convenience was not in favour of the plaintiffs. He therefore, submitted that the plaintiffs have in fact made out a prima facie case and till all the issues involved in the suit are decided, it is necessary to protect the interest of the plaintiffs and for that purpose restrain the defendant nos.1 and 2 from creating any third party interest in the land admeasuring 400 sq.mtrs bearing plot no.28 Sector no.34B which is allotted to defendant nos. 1 and 2. He, therefore, submitted that appeal be allowed and temporary injunction as prayed be granted.

13. As against this Shri Vinit Naik, learned Advocate for the defendant nos.1 and 2 supported the

order passed by the learned trial Judge and submitted that land bearing Plot NO.28 Sector 34 is not allotted to the defendant nos 1 and 2 in lieu of acquisition of the land bearing Survey No.6/1B-1D-2-6-8/2 of village Owe,Kharghar which is mentioned in the agreement. He, therefore, submitted that the plaintiffs are not entitled to get any relief in respect of the said land.

14. From the pleadings of the parties and the agreement dated 21-9-1994 which is produced by the plaintiffs, it is very clear that some agreement took place between the plaintiffs and defendant nos.1 and 2 on 21-9-1994. Admittedly, the said agreement is signed by the defendant nos 1 and 2. Their only grievance is that on that day the plaintiffs advanced loan of Rs.1,27,000/- to them without interest and by way of security he obtained their signatures on the said document. Prima facie this contention cannot be accepted. It is very difficult to believe that the plaintiffs who were builders, developers would advance such huge amount to defendants, who are in fact strangers, by way of loan and that too without interest. It is the case of the defendant nos.1 and 2 that after this amount was given to them by way of loan the plaintiffs did not contact them at any time and did not ask them to return the said amount. The question arises what the defendants did? Whether at

any point of time they had tried to satisfy the said loan. So, considering the facts and circumstances of the case and the conduct of the defendants prima facie there does not appear to be any substance in the contention of the defendants that document in question was got executed by the plaintiffs by deceiving them or by making false representation. It must be noted that even the learned trial Judge has also not refused the plaintiffs claim of temporary injunction by holding that prima facie there appears to be some substance in the said grievance of the defendant nos.1 and 2.

15. The only ground on which the learned trial Judge has refused to grant temporary injunction is that on the day when the agreement was executed the suit land was not in existence and as such according to him the agreement to assign such land which was not in existence was bad in law. However if we carefully peruse the agreement dated 21-9-1994 then it prima facie shows that by virtue of the said agreement the defendant nos.1 and 2 had only represented to the plaintiffs that they are project affected persons and they would be getting some land and the land which they would receive or will be allotted to them will be assigned or given by them to the plaintiffs. So, at the most one may say that on the day when the agreement was executed a particular plot of land was

not identified but it was specifically agreed by the defendants that the land which would be received by them to the extent of 300 sq.mtrs will be assigned or given to the plaintiffs at the rate of Rs.1700/- per sq.mtr. So, this is not a case where the land was not at all in existence nor it can be said that such type of contract is against the provisions of Contract Act.

16. Shri Kamdar, learned Advocate for the plaintiffs submitted that in a case of an agreement to sale the land by the vendor, specific performance cannot be refused merely because the vendor's title is defective and the vendor cannot be permitted to set up such a defence in a suit for specific performance filed by the purchasers. For this proposition he has placed reliance on a case - **Deenanath V/s Chunilal AIR 1995 Raj 69**. Similarly he submitted that merely because even after allotment of the land to the defendants further permission from the competent authority was necessary, cannot be said to be sufficient ground to reject the plaintiffs' application for temporary injunction. This proposition is also supported by judgment in a case **Nirmal Anand V/s Advent Corporation (P) Ltd and Ors. (2002) 5 SCC 481.** So, I do not find anything in the agreement in question even to suggest that the agreement in question is bad in law.

17. Shri Vinit Naik, learned Advocate for the defendant nos.1 and 2 very ingeniously argued before me that the plaintiffs are seeking relief in respect of the land bearing plot no.8 Survey No.28 Sector 34B admesuring 400 sq.mtrs but the said land is not allotted to the defendants in lieu of the land which is mentioned in the agreement and hence plaintiff is not entitled for temporary injunction. During the course of the argument the learned Advocate has submitted one statement from which it appears that the land admesuring 300 sq.mtrs bearing plot no.101 Sector no.30 is allotted to the defendants in lieu of acquisition of land mentioned in the agreement. Naturally, question arises whether there was specific agreement between the plaintiffs and defendants that the defendant would allot the land which they would be getting only in lieu of Survey No.6/1 B-1D-2-6-7 i.e. land which is mentioned in the agreement. It is true that in para 2 of the agreement it is mentioned that the defendants are the owners of the above mentioned land bearing survey no.6. However, subsequently in the said agreement it is nowhere specifically mentioned that the defendants would allot a particular land which they would be receiving in lieu of the land bearing Survey No.6 hissa no.7 1B-1D-2-6-7. On the contrary while considering this issue one has to read the document or agreement as a

whole. From the perusal of the same it appears that defendant nos.1 and 2 had only agreed that they would be getting some land as they being project affected persons and the land would be then assigned to plaintiffs and area of the land to be assigned and rate of such land was also specified. What is more to be noted is that neither in the notice reply nor in the reply to the application exh.5 the defendant nos.1 and 2 have taken such specific contention.

18. There is another aspect of the matter. Plaintiffs have specifically averred in the plaint that it was agreed between plaintiffs and the defendants that on receipt of the letter of allotment from the defendant no.3 by defendant nos.1 and 2, they would give the said letter to the plaintiffs for taking further necessary steps with regard to transfer or seeking necessary permission for transfer. So, when defendants 1 and 2 received the letters regarding allotment of various plots, it was in fact necessary for the defendants to show the said letter to the plaintiffs, but they kept mum. So, considering these facts it cannot be said that the plaintiffs are not entitled to get relief in respect of the plot No.28. In fact, if defendants would have brought this fact to the notice of the plaintiffs that in lieu of Survey no.6 they have received plot no.101 Sector no.30 admeasuring 300 sq.mtrs they

would have asked the relief in respect of the said land. So, prima facie the main object of the agreement in question was to allot the land that was to be received by the defendants as project affected persons under 12.5% scheme to the assignee-plaintiffs. So, prima facie when plaintiffs have shown that the defendants have actually received plot no.28 under the above mentioned scheme then as a result of the agreement in question they are entitled to file a suit for specific performance. Certainly there are tribal issues in the matter and till the said issues are finally decided after having full fledged trial it is essential to protect the interest of the plaintiffs and to preserve the property in question and to avoid multiplicity of proceedings. So, considering all these aspect I am of the view that the plaintiffs have made out a prima facie case for granting temporary injunction as prayed.

19. The learned trial Judge has observed in the order that it was the contention of the defendants that plaintiffs obtained their signatures on blank paper. This observation is not correct. The defendants have not at all contended that their signatures were obtained on blank papers. On the contrary, they have stated that they signed some paper which was written in English.

20. Turning to the question of balance of convenience it must be noted that admittedly the defendants have received amount of Rs.1,27,000/- from the plaintiffs in the year 1994 and all along they used the said amount till the filing of the suit. As it is, there is no record before me to show that the defendants have deposited the amount of Rs.1,27,000/- in the court as per the order passed by the learned trial Judge. So, when such huge amount is parted by the plaintiffs and they have not received any fruits of the same, it cannot be said that balance of convenience is not in his favour or that no irreparable loss is likely to be caused to him.

21. In view of the above, I am of the considered view that the order passed by the learned trial Judge is not legal and correct and as such it is necessary to set aside the same. Hence, I pass the following order.

ORDER

i. The appeal is allowed. The order passed by the Civil Judge, S.D., Alibag-Raigad below Exh.5 in Special Civil Suit No.14 of 2005 rejecting the plaintiff’s application for temporary injunction is set aside.

ii. The application Exh.5 is partly allowed.

iii. The defendant nos.1 and 2 are restrained from creating any third party interest in respect of the land admeasuring 300 sq.mtrs out of plot no. 28, Sector no.34B of village Owe, Post Kharghar, in any manner till the disposal of the suit.

iv If the defendant nos.1 and 2 have deposited the amount of Rs.1,27,000/- in the Court and the same is withdrawn by the plaintiffs then the same be returned by the plaintiffs to the defendant nos.1 and 2 within one month from today. In case the said amount is not withdrawn by the plaintiffs then the defendant nos.1 and 2 are at liberty to receive the said amount from the Court immediately.

v. The trial Court is directed to dispose of the suit according to law on merits, expeditiously and in any event within 4 months from today, without getting influenced by the observations made in this order.

vi. Parties to appear before the trial Court on 19-11-2007.

vii. A.O. is disposed of accordingly.

viii. Parties to act on authenticated copy of this order.

(S.R.SATHE,J.)